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No. 96-667

In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT E. HYDE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

WALTER DELLINGER
Acting Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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Our position in this case is that when a defendant properly tenders a guilty plea under Rule 11 of the Federal Rules of Criminal Procedure and the court duly accepts it, the defendant may withdraw that plea only if the defendant has a "fair and just reason" to do so under Rule 32(e) or if the court rejects the accompanying plea agreement under Rule 11(e)(4). That position is dictated by the explicit provisions of Rules 32 and 11 that provide for withdrawal of guilty pleas under those reasonable conditions.

Respondent does not and cannot claim that there is any provision in Rule 11 or 32—or anywhere else in federal law—that expressly prohibits a district court from accepting a guilty plea before it has decided

whether to accept an accompanying plea agreement. Instead, respondent argues that a plea should be subject to free withdrawal until the court decides whether to accept the plea agreement because, first, some of the notes accompanying the 1975 amendment to Rule 32 regarding disclosure of presentence reports suggest that the Advisory Committee believed that courts would defer acceptance of a plea until they had accepted an accompanying plea agreement, see Resp. Br. 12-16; second, providing the defendant an absolute right to withdraw a guilty plea even if the defendant has no fair and just reason to do so is "essential to the fair administration of justice," *id.* at 26; and, third, the court of appeals' rule of free withdrawal at any time until the eve of sentencing would not inject instability into the plea bargaining process, *id.* at 29-40. Each of those contentions is wrong.

1. a. Before 1975, Rule 32 provided that a presentence report "shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty." 18 U.S.C. App. Rule 32(c)(1) (1970). In 1974, the Advisory Committee proposed a number of amendments to the Federal Rules that for the first time addressed plea bargaining and plea agreements. Those amendments included an amendment to Rule 32, which modified the Rule to provide that a presentence report may be disclosed only if "the defendant has pleaded guilty or nolo contendere or has been found guilty, *except that a judge may, with the written consent of the defendant, inspect a presentence report at any time.*" 18 U.S.C. App. Rule 32(c)(1) (1976) (emphasis added). The amendment thus provided that a presentence report could be

disclosed to the court not only when a defendant had pleaded guilty or been found guilty, but also when the defendant had consented to such disclosure. Congress adopted that amendment without change in 1975. Pub. L. No. 94-64, § 3(5)-(10), 89 Stat. 371-372.

Respondent argues (Resp. Br. 10) that the change in Rule 32 to permit disclosure of a presentence report with the defendant's consent demonstrates "that Congress intended that a guilty plea is neither accepted nor binding until the district court has also accepted the plea agreement." Respondent relies in particular on the following passage from the Advisory Committee Notes that discussed that change in Rule 32:

> Because many plea agreements will deal with the sentence to be imposed, it will be important, under rule 11, for the judge to have access to sentencing information as a basis for deciding whether the plea agreement is an appropriate one.
>
> It has been suggested that the problem be dealt with by allowing the judge to indicate approval of the plea agreement subject to the condition that the information in the presentence report is consistent with what he has been told about the case by counsel.
>
> Allowing the judge to see the presentence report prior to his decision as to whether to accept the plea agreement is, in the view of the Advisory Committee, preferable to a conditional acceptance of the plea. It enables the judge to have all of the information available to him at the time he is called upon to decide whether or not to accept the plea of guilty and thus avoids the

> necessity of a subsequent appearance whenever the information is such that the judge decides to reject the plea agreement.

Proposed Amendments to the Federal Rules of Criminal Procedure, 62 F.R.D. 271, 323 (1974) (citations omitted). Respondent argues that the 1975 change permitting the court to review a presentence report with the defendant's consent would have been unnecessary if the court had authority to accept a guilty plea before accepting an accompanying plea agreement. He reasons that if a court had authority to accept the guilty plea while deferring consideration of the plea agreement, the court could review the presentence report even without the defendant's consent under Rule 32 as it stood both before and after the amendment.

b. Respondent's attempt to derive from the amendment to Rule 32 a prohibition on a district court's ability to accept a guilty plea before accepting an accompanying plea agreement is implausible. The Advisory Committee has no authority to impose requirements of that sort by omitting them from the Rules themselves, but including them in its notes to a proposed rule change. Had the Advisory Committee intended to impose the rule respondent claims, it could easily have done so in the text of the contemporaneous amendments it was proposing—and which Congress in relevant part adopted—to Rule 11.[1]

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[1] For example, the Advisory Committee could have made respondent's requirement explicit simply by adding four words to its amendment to Rule 11(e)(2) regarding deferral of a decision on the plea agreement. The four words are indicated in italics below:

> If the agreement is of the type specified in subdivision (e)(1)(A) or (C) [calling for dismissal of charges or a specific sentence], the court may accept or reject the agreement *and accompanying guilty plea*, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report.

The reason that the Advisory Committee did not adopt respondent's requirement in the text of Rule 11 is that the Committee did not intend to impose such a requirement. The 1975 amendments codified plea bargaining procedures for the first time. There was therefore some doubt as to how the new procedures would be most effectively implemented. As the above quotation from the 1974 Advisory Committee Notes indicates, the Committee was particularly concerned about plea agreements that provided for the "sentence to be imposed"—*i.e.*, specific-sentence agreements under Rule 11(e)(1)(C). Accordingly, the Committee's likely intent was to afford a district court the opportunity—but not to impose the requirement—of deferring acceptance of a guilty plea in such specific-sentence cases until it had seen the presentence report. If a court wanted to defer decision on a guilty plea, however, the existing provisions of Rule 32 would have precluded the court from reviewing the presentence report, since the report was available to the court only after the defendant pleaded guilty or was found guilty. Therefore, the Committee amended Rule 32 to add the provision for release of a presentence report to the court with the defendant's consent, even before the acceptance of the guilty plea.[2]

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[2] Although courts rarely decide to defer their decision on whether to accept a plea of guilty, that circumstance does occasionally arise. See, *e.g.*, *United States* v. *Washman*, 66 F.3d

Nothing in the text of the amendment or the Advisory Committee Notes suggests that the Committee intended that the plea-deferral procedure would be mandatory if there were a plea agreement.

In addition, the Advisory Committee was aware that a presentence report could be prepared before the guilty plea colloquy, although that practice was and is relatively rarely used. See 62 F.R.D. at 323 (noting "authority to have a presentence report *prepared* prior to the acceptance of the plea of guilty," and citing *Gregg* v. *United States*, 394 U.S. 489, 491 (1969)); *United States* v. *Ball*, 547 F. Supp. 929, 933 (E.D. Tenn. 1981). In such cases, too, the amendment to Rule 32 would permit a judge to review the report before deciding whether to accept the guilty plea.

c. In any event, the relevant Advisory Committee Notes in this case are not the notes the Committee prepared in 1974 regarding the disclosure of presentence reports. The issue here is whether the defendant may avoid the "fair and just reason" standard of Rule 32(e) for withdrawal of a guilty plea before

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210, 212 (9th Cir. 1995) ("[T]he record clearly indicates that the magistrate judge did not accept [defendant's] plea at the change of plea hearing, but indicated that the court's decision as to whether to accept the plea would be deferred until the district court had an opportunity to review [defendant's] presentence report."); *United States* v. *Bunch*, 730 F.2d 517, 518 & n.1 (7th Cir. 1984); see also *United States* v. *Ewing*, 957 F.2d 115, 118 n.2 (4th Cir.) ("There is no reason apparent to us that the district court could not have deferred acceptance of the *guilty plea* as well as the *plea agreement* until consideration of the presentence report, but this was not what was done."), cert. denied, 505 U.S. 1210 (1992). In cases like *Washman* and *Bunch*, the amendment to Rule 32 permitting review of the presentence report with the consent of the defendant is essential.

sentencing. The "fair and just reason" standard, however, was added to Rule 32 only in 1983.[3] It is the notes discussing that amendment—not the notes discussing the amendment to the presentence report disclosure requirements in 1975—that provide a useful guide to the Committee's intent. Cf. *Libretti* v. *United States*, 116 S. Ct. 356, 364 (1995) ("We cannot agree that the Advisory Committee's Notes on the 1972 amendment to Rule 31(e) shed any particular light on the meaning of the language of Rule 11(f), which was added by amendment to Rule 11 in 1966.").

When it added the "fair and just reason" standard to the statute in 1983, the Advisory Committee canvassed various positions taken by courts on the circumstances under which a defendant should be able to withdraw a guilty plea before sentencing. The Committee did not consider the possibility that a court might permit the defendant absolute discretion to withdraw a guilty plea. The Committee did note, however, that "[s]ome courts proceed as if any desire to withdraw the plea before sentence is 'fair and just' so long as the government fails to establish that it would be prejudiced by the withdrawal." *Amendments to Rules*, 97 F.R.D. 245, 313 (1983). Other courts, by

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[3] Before 1983, Rule 32 provided a standard ("manifest injustice") for withdrawal of a guilty plea after sentencing, but it was silent regarding the standard for withdrawal before sentencing. The Rule provided:

> A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

18 U.S.C. App. Rule 32(d) (1976).

contrast, took the position that "there is no occasion to inquire into the matter of prejudice unless the defendant first shows a good reason for being allowed to withdraw his plea." *Ibid.*

The Committee resolved the dispute "by requiring that the defendant show a 'fair and just' reason." 97 F.R.D. at 313. The Committee explained that the current provisions of Rule 11 supported that position:

> Rule 11 now provides for the placing of plea agreements on the record, for full inquiry into the voluntariness of the plea, for detailed advice to the defendant concerning his rights and the consequences of his plea and a determination that the defendant understands these matters, and for a determination of the accuracy of the plea. Given the great care with which pleas are taken under this revised Rule 11, there is no reason to view pleas so taken as merely 'tentative,' subject to withdrawal before sentence whenever the government cannot establish prejudice.
>
> > Were withdrawal automatic in every case where the defendant decided to alter his tactics and present his theory of the case to the jury, the guilty plea would become a mere gesture, a temporary and meaningless formality reversible at the defendant's whim. In fact, however, a guilty plea is no such trifle, but "a grave and solemn act," which is "accepted only with care and discernment."

Id. at 313-314 (quoting *United States* v. *Barker*, 514 F.2d 208, 221 (D.C. Cir.) (en banc), cert. denied, 421 U.S. 1013 (1975) (quoting in turn *Brady* v. *United States*, 397 U.S. 742, 748 (1970))).

At the time it amended Rule 32 to incorporate the "fair and just reason" standard, therefore, the Advisory Committee made unmistakable its intent that that standard would apply once the guilty plea had been tendered and accepted in compliance with Rule 11's careful procedures. Under respondent's view, however, in the large number of cases in which a court defers the decision whether to accept an accompanying plea agreement, the defendant "[is] free to withdraw his tendered guilty plea at will" until the court decides whether to accept the agreement. Resp. Br. 17. As we explain in our opening brief (at 22-23), that means that in those cases, respondent's "at will" standard would displace Rule 32(e)'s "fair and just reason" standard from the time of the Rule 11 colloquy until at or near sentencing. That view is inconsistent with the text of Rule 32(e) (which applies at any time "before sentence is imposed") and with the Advisory Committee's intent to ensure that the Rule 11 colloquy be treated as something more than "a mere gesture, a temporary and meaningless formality reversible at the defendant's whim."[4]

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[4] Respondent argues (Resp. Br. 17-22) that the "fair and just reason" standard that this Court originally articulated in *Kercheval* v. *United States*, 274 U.S. 220 (1927), would not have applied to the circumstances of this case. We disagree with respondent's interpretation of *Kercheval*; in our view, a guilty plea under modern practice would be sufficiently final to trigger the imposition of the "fair and just reason" standard under the common law rule of *Kercheval*, even without the authority of Rule 32(e). This case, however, is not governed by the common law rule of *Kercheval*. It is governed by the 1983 amendment to Rule 32—what is now Rule 32(e)—that applies

2. Respondent argues (Resp. Br. 26) that his rule precluding a court from accepting a guilty plea until the court has accepted an accompanying plea agreement should be adopted because "it is manifestly unfair to bind a defendant to an agreement before the prosecutor and the court are likewise bound and before the defendant can rely on the agreement." The premise of that argument, however, is incorrect.

After a court accepts a guilty plea, the defendant and the government are each bound to the plea agreement to precisely the same extent. The defendant has usually already performed the greater part of his commitment—the tender of the guilty plea. Although the government's performance may become due over a period of time (*e.g.*, the dismissal of charges will occur only after the court accepts the plea agreement), the government may not simply repudiate its commitments or walk away from the agreement. See *Santobello* v. *New York*, 404 U.S. 257, 262 (1971).[5]

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the "fair and just reason" standard to motions to withdraw a guilty plea before sentencing. Both Rule 32(e) itself and the Advisory Committee Notes quoted in the text make clear that the "fair and just reason" standard was intended to be applicable from the time that a plea was accepted in accordance with Rule 11's requirements until the time of sentence.

[5] Respondent argues (Resp. Br. 26-27) that courts have held that "before the court accepts the agreement the defendant cannot reasonably rely upon it" and that we seek the "anomalous result that a defendant be bound by an agreement during a period of time when he or she cannot rely upon the agreement." The cases cited by respondent, however, stand for quite different propositions, *i.e.*, that the defendant cannot rely on the hope that a court would accept a plea agreement, in a case where the court deferred decision on the agreement, *United States* v. *Livingston*, 941 F.2d 431, 436 (6th Cir. 1991); that the defendant may not rely on an "oral plea agreement"

The government's performance may be conditional on the court's acceptance of the plea agreement, but that does not alter the fact that the government is bound by the agreement unless the court rejects it. If the court does reject it, the parties will be returned to the position each was in before the agreement was entered; the defendant has the right under Rule 11(e)(4) to withdraw his guilty plea and the prosecution is released from whatever commitments it made.[6] As with many other sorts of contracts, neither the fact that the agreement is "conditional" in this sense,

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that is never put before the court and that the court would not have accepted had it been informed of it, *United States* v. *Wessels*, 12 F.3d 746, 752-753 & n.2 (8th Cir. 1993), cert. denied, 513 U.S. 831 (1994); and that the defendant may rely on—and enforce—a plea agreement in a case in which the court has accepted both the plea and the plea agreement, *United States* v. *Blackwell*, 694 F.2d 1325, 1338-1339 (D.C. Cir. 1982) ("There is no dispute that the trial judge here accepted the guilty plea and that its bargained-for predicate, the dismissal of the gun charge at the time of sentencing, was set out on the record and accepted by her as well."). Although some comments in *Blackwell* fail to distinguish between the plea and the plea agreement, the distinction was of no consequence in that case. None of the cases supports respondent's claim that the prosecutor is not bound by the agreement before the court accepts it.

[6] Respondent refers (Resp. Br. 21) to the Rule 11(e)(4) withdrawal procedure as a circumstance in which "Rule 32(e)'s 'fair and just reason' standard does not apply." That statement is misleading. It is true that a defendant in that situation need not make a particularized showing of a "fair and just reason" to withdraw his plea. But that is because the fact that the district court has rejected the plea agreement automatically provides such a "fair and just reason." There is *no* provision of the Rules that permits a defendant to withdraw an accepted guilty plea for no reason at all or that supports the creation of such a right of free withdrawal.

nor the fact that the bargain often involves an exchange of a performance (the guilty plea) in return for a promise (the prosecutor's future action), makes it "manifestly unfair" (Resp. Br. 26) to bind both parties to their commitments. See Restatement (Second) of Contracts § 225 (effects of non-occurrence of a condition), § 377 (restitution in cases of non-occurrence of a condition) (1981).[7]

Respondent also argues (Resp. Br. 27) that "in light of the complexity and determinate nature of the Sentencing Guidelines, allowing defendants to review the presentence report before they are bound by the agreement serves the important function of having defendants understand the implications of the agreements they enter." As we explain in our opening brief (at 20), however, the Federal Rules squarely rejected the argument that a defendant should generally have the opportunity to review his presentence report before finally committing himself to his plea. Moreover, even under respondent's view, defendants who plead guilty without an agreement—

[7] Respondent asserts (Resp. Br. 24 n.9) that in our brief in opposition in *Cordova-Perez* v. *United States*, No. 95-9101, we took a different position. We explained in our reply brief at the certiorari stage of this case that our brief in opposition in *Cordova-Perez* did not endorse the Ninth Circuit's view that deferral of a decision on a plea agreement as a general rule renders acceptance of a plea agreement conditional. See U.S. Reply Br. 6-8. Indeed, our long-standing position has been that "it is clear that Rule 11 permits withdrawal of a guilty plea * * * only if the court rejects the agreement. Unless the court rejects the agreement, therefore, the right to withdraw the plea is governed entirely by Rule 32(d)." U.S. Brief in Opp. at 7, *Ellison* v. *United States*, cert. denied, 479 U.S. 1038 (1987) (No. 86-5688). (We are supplying respondent with a copy of our brief in opposition in *Ellison*.)

or with only a recommended-sentence agreement under Rule 11(e)(1)(B)—would have no opportunity to review their presentence reports before being bound to their guilty pleas. There is no reason for treating those defendants differently with respect to advance review of their presentence reports from defendants who, like respondent, have obtained a dismissal-of-charges or specific-sentence agreement.

3. Respondent argues (Resp. Br. 29-40) that the Ninth Circuit's rule of free withdrawal will not inject instability into the plea bargaining process.

Initially, respondent minimizes the significance of the Ninth Circuit's rule of free withdrawal by arguing that the rule would not apply to all plea bargains. But respondent concedes that the Ninth Circuit's rule applies at least to agreements that provide for dismissal of charges and agreements that provide for a specific sentence. See Resp. Br. 30. Although we agree with respondent that specific-sentence agreements are "very rare," we also agree with respondent that dismissal-of-charges agreements "appear to be the most common." *Ibid.* The parties in this case therefore agree that the Ninth Circuit's rule would apply to at least a sizable number of guilty pleas.

Respondent also downplays (Resp. Br. 31) the dangers of "manipulation or gamesmanship" inherent in a rule of free withdrawal because, in his view, there are "effective tools to eliminate any incentives" for defendants to abuse the rule. For example, respondent claims that agreements providing for dismissal of charges either are "relatively empty promises which offer very little to defendants," *id.* at 32, or "guarantee such significant sentence protection that few defendants would seek to withdraw from those agreements," *id.* at 33. Respondent also argues that

defendants will not attempt to withdraw from plea agreements because their guilty pleas are generally essential to obtaining a two- or three-level reduction in their offense level for acceptance of responsibility under Sentencing Guidelines § 3E1.1 (1996). See Resp. Br. 33-34.

To be sure, in many plea agreements, the nature of the agreement and the value of the promises exchanged will be sufficiently valuable to each of the parties that neither will at any point want to withdraw from the agreement. Rule 32(e)'s "fair and just reason" standard, however, was adopted to address situations in which the defendant does want to withdraw—because of a change of circumstances, a change of mind, or some other reason. That defendants may choose in many (or even most) cases to adhere to their guilty pleas provides no basis for dispensing with Rule 32(e)'s "fair and just reason" standard in cases in which the defendant *does* want to withdraw.

Moreover, respondent's dismissal (see Resp. Br. 39-40) of the danger of manipulation and gamesmanship is unjustified. Respondent argues (*id.* at 38) that "defendants are * * * harmed by delay" and may not have any desire to postpone a trial. It is of course true that some defendants are anxious to have a trial occur as quickly as possible. But there are undoubtedly many defendants who believe they would benefit from a trial delay. For example, a defendant indicted along with a number of co-conspirators may be unable to obtain a severance under Federal Rule of Criminal Procedure 14, but would nonetheless like to delay his own trial in order to be tried separately from his co-conspirators. Where a government witness's health or future availability is in doubt, a defendant may seek

a delay in hopes that the witness will become unavailable. And, where a defendant is at liberty on bail, a defendant may well have an incentive to delay trial as long as possible.

In those and other situations, the Ninth Circuit's rule of free withdrawal offers defendants an opportunity to plead guilty and then later withdraw from the guilty plea, simply to obtain an unjustified and unwarranted delay of trial. Indeed, respondent would apparently allow the prosecution as well to withdraw from a plea agreement for no reason at all, at any time until the agreement had been accepted by the district court. See Resp. Br. 18. That would create a highly unstable process, in which neither party could rely on the other's continued adherence to its commitments.[8]

Moreover, even in cases in which the defendant would not exercise his right of at-will withdrawal, the Ninth Circuit's approach injects instability into the

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[8] The possibility that the prosecution also could withdraw from the plea agreement could be highly unsettling to preparation of the presentence report. As a practical matter, the report would have to be prepared in most cases during the period when either side could freely withdraw from the agreement. That creates a dilemma for the defendant. The presentence report ordinarily must include substantial information that can be gathered most efficiently—and most accurately—only with the defendant's cooperation. Yet a defendant who cooperated with preparation of the presentence report would be taking the risk that the information provided could be used against him by a prosecutor who, having read the presentence report, decides simply to withdraw from the deal. Even if the presentence report would not itself be admissible evidence under Rule 11(e)(6), nothing would stop the prosecutor from making use of the information in the report in other ways if the prosecutor decided to withdraw from the agreement and force the defendant to trial.

plea bargaining process because there will always remain the threat that the defendant will decide to walk away from the bargain at some time before sentencing. The prosecution's response could be to make plea bargains available to fewer defendants, especially where the prosecution was aware that possible withdrawal of the plea could give the defendant an unjustified strategic advantage.[9] That result would increase the burdens on all parties—the prosecution, the defendants, and the courts—without offering any compensating advantage.

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[9] Respondent cites (Resp. Br. 38-39) statistics showing that the rate of guilty pleas in the Ninth Circuit has increased slightly in the year ending September 30, 1996, as compared to the prior year. The Ninth Circuit's decision in this case was entered on April 30, 1996. Therefore, the year for which respondent cites statistics included only five months after the Ninth Circuit's decision in this case. The statistics do not distinguish between the rate of guilty pleas during that five-month period and the rate during the balance of the year at issue. Nor does respondent attempt to control for any of the numerous other factors that could have otherwise accounted for an increase, decrease, or stability in the rate of guilty pleas during the periods of time to which he refers. Moreover, the Ninth Circuit's decision may well have had little effect on the behavior of prosecutors or defendants until it was broadly disseminated and, perhaps, until the government's petition for rehearing was denied on July 29, 1996. Thus, the statistics cited by respondent are of no value without a far more detailed analysis than that provided by respondent. Finally, even if the statistics were of value, the rule of withdrawal would inject instability into the plea bargaining process as explained in text and reduce respect for judicial proceedings, even if most cases proceeded to sentencing as before.

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

WALTER DELLINGER
Acting Solicitor General

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